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Nos. 83-1138, 83-1155, 83-6086 and 83-6092

# In the Supreme Court of the United States

OCTOBER TERM, 1983

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GARY J. PEED and JAMES C. CODDINGTON, PETITIONERS

*v.*

UNITED STATES OF AMERICA

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JAMES MAURICE JACKSON, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

JEFFREY CRAIG BUMGARDNER, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

TERESA ELEAZAR, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether petitioners were deprived of their right to a fair trial because of a juror's unfounded suspicions about an event outside the courthouse that were dispelled by the district judge during an ex parte inquiry.

2. Whether petitioner Jackson was tried within the time limitation imposed by the Interstate Agreement on Detainers Act, 18 U.S.C. App. § 2, Art. IV(c).

3. Whether telephone calls monitored by state police officers with the consent of a participant were properly admitted in evidence in a federal trial.

4. Whether there was sufficient evidence to support petitioner Eleazar's conviction.

5. Whether Local Rule 19 of the United States Court of Appeals for the Fourth Circuit violates due process.

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# In the Supreme Court of the United States

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No. 83-6086

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## OPINION BELOW

The opinion of the court of appeals (83-1138 Supp. App. 1a-18a) is reported at 717 F.2d 1481.

## JURISDICTION

The judgment of the court of appeals was entered on September 9, 1983. A petition for rehearing was denied on November 14, 1983. The petitions for a writ of certiorari were filed as follows: No. 83-1138 on January 11, 1984; No. 83-6086 on January 12, 1984; and Nos. 83-1155 and 83-6092 on January 13, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the Eastern District of North Carolina, all petitioners were convicted on one count of conspiring to possess cocaine with intent to manufacture and distribute, in violation of 21 U.S.C. 846 (Count 1). Except for petitioner Eleazar, each petitioner was also convicted on one of several counts of using a communication facility to facilitate the conspiracy, in violation of 21 U.S.C. 843(b) (Counts 4-7) (83-1138 Supp. App. 3a).[1] Petitioners Peed, Coddington, and Jackson were sentenced to four-year terms of imprisonment on each count, with the sentences on the facilitation counts suspended in favor of a five-year term of probation to run consecutively to the term of imprisonment on the conspiracy count (C.A. App. 288, 291, 292). Petitioner Bumgardner was sentenced to five years' imprisonment on the conspiracy

[1] Upon petitioners' motions before trial, an additional count (Count 2) charging conspiracy to possess marijuana with intent to distribute was severed.

count, all but six months of which was suspended in favor of five years' probation; his four-year sentence of imprisonment on the facilitation count was suspended in favor of a five-year probationary term, to run concurrently with the sentence on the conspiracy count (C.A. App. 294). Petitioner Eleazar was sentenced to a five-year term of imprisonment on the conspiracy count, all but six months of which was suspended in favor of five years' probation (C.A. App. 290).[2]

1. Testimony presented at trial by cooperating co-conspirators showed the existence of a two-tiered drug conspiracy. The first tier was centered in Apex, North Carolina, under the supervision of James "Jacques" Provost. Jacques' two investors or partners were petitioner Peed in Virginia and petitioner Coddington in Florida. The first tier employed three drug couriers, one of whom was petitioner Jackson, who shuttled drugs and drug cutting agents between the first tier and the second, smaller tier in Jacksonville, Florida. Petitioners Bumgardner and Eleazar (who was Jackson's sister and Bumgardner's girlfriend) were part of the second tier. 83-1138 Supp. App. 3a.

The testimony of the cooperating co-conspirators was amplified by the playing of numerous recorded

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[2] Ronald Doyle Hines, a co-defendant whose convictions on one count each of conspiracy and using a communication facility to facilitate that conspiracy were also affirmed by the court of appeals, was sentenced to the same sentence petitioner Bumgardner received (83-1138 Supp. App. 3a; C.A. App. 289). Of the four additional people indicted with petitioners, three (Donald Christopher Provost, Darryl Stephen Provost and Peter David Stisser) pleaded guilty prior to trial, and the charges against the fourth (Tina Pitts Provost) were dismissed on the government's motion. Darryl Provost and Peter Stisser testified for the government at trial.

telephone conversations among the conspirators. In these conversations, petitioner Peed discussed the quality, quantity, and types of cocaine by the use of coded terms (12 R. 178-186)[3] as well as the planned delivery to him of cocaine by Darryl Provost (12 R. 75-79). In another conversation, petitioner Coddington discussed with Jacques Provost cocaine quality, delivery dates, and quantity (12 R. 159-169); the next day, after Darryl Provost had been arrested with cocaine in Virginia, they discussed the arrest, the sale of land to raise funds for cocaine, and the amount of money needed to pay for the cocaine confiscated in Virginia (13 R. 81-92). Petitioner Jackson was recorded requesting Darryl Provost to bring him tools for treating cocaine (12 R. 104-105) and discussing the pickup of proceeds from cocaine sales (14 R. 147-148, 171-174, 188-194).

The participation of petitioners Bumgardner and Eleazar in the drug scheme was similarly evidenced by their recorded conversations. In a conversation with Jackson, petitioner Bumgardner discussed drug transactions using coded terms (14 R. 245-249). Later, after discussing "the weights and everything" (*ibid.*), Jackson determined from Bumgardner that certain scales were "triple beam" and told Bumgardner to "take that thing and make four of them out of it" (15 R. 10-11). The next day Jackson asked Bumgardner whether or not "they look like they're weighed out right," and Bumgardner indicated that he did only "2 G's at a time" (15 R. 74-75).

Petitioner Eleazar's boyfriend (Bumgardner) and brother (Jackson) used her telephone to carry out drug transactions (11 R. 137-138). During at least one conversation, she listened on an extension phone

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[3] "R." refers to the record on appeal.

and twice interjected comments in the conversation (15 R. 108-109). During one call, she told Jackson that "Ronnie got all that stuff" (14 R. 91), and later in the same call Bumgardner told Jackson that "Teresa [Eleazar] went by and picked it up" (14 R. 92-93). During another call, petitioner Jackson directed co-defendant Hines to give money to Bumgardner, "because I'm gonna get them to wire me the money" (15 R. 80, 81). Three days later, Jackson instructed his sister how to wire money to Jacques Provost in North Carolina and told her "if you got to leave a name, just give some, you know, anonymous name, you know" (15 R. 102).

2. After the verdicts were returned, petitioners learned that during trial one of the jurors had become concerned by a courthouse incident and had reported the matter to the district judge, who, after investigation, had reported back to the juror (83-1138 Pet. App. 13a-16a). At the request of counsel (*id.* at 11a), the district court conducted a hearing on September 30, 1982, attended by all petitioners (except Bumgardner, who had been arrested on other charges the night before) and their counsel (9/30/82 Tr. 5). The testimony at that hearing showed that, during trial, an FBI agent investigating another matter attempted to photograph some of the defense witnesses as they left the courthouse at the end of the day (83-1138 Supp. App. 17a; 83-1138 Pet. App. 20a, 25a-26a). To focus his camera, he aimed it at several people, including some jurors, as they left the courthouse (83-1138 Pet. App. 26a).

One of the jurors, Bryant Deaton,[4] observed the photography, noted the license number of the pho-

[4] Juror Deaton's name was misspelled "Denton" by the court of appeals (83-1138 Supp. App. 17a).

tographer's car, and returned to the courthouse to report the incident (83-1138 Pet. App. 19a-20a, 30a). The judge called Deaton into chambers, where Deaton reported the incident in the presence of the judge's clerk and gave the judge the piece of paper with the license plate number (*id.* at 20a, 30a-31a, 35a). After the juror's departure, the district judge called the FBI, described the events, and gave the agents the license number provided by Deaton (*id.* at 20a, 24a-25a). The investigating agent determined that another agent was responsible for the photography and reported that fact to the district judge early the following morning (*id.* at 25a-26a).

When juror Deaton arrived in the jury room the following morning, he expressed his concern about the incident to the foreman (9/30/82 Tr. 105). The district judge then called Deaton to his chambers to notify him of the result of his investigation. The district judge told Deaton that he had determined who had been taking the photographs; that the photography had not been aimed at the jurors and that Deaton should not consider it to have been directed at him or at any other juror; and that the judge would prefer not to describe the background of the incident in detail at that time but would do so at the end of trial (83-1138 Pet. App. 20a, 31a). When juror Deaton returned to the jury room, he recounted the incident to the other jurors and reported that the judge "had assured [him] that everything was okay" (*id.* at 32a, 36a). The incident was not discussed or mentioned again among the jurors during trial or deliberations (*id.* at 32a, 34a, 36a).

Juror Deaton testified that when he initially saw the photographer he was apprehensive, thinking that someone might be photographing the jurors in order to retaliate if they returned a guilty verdict (83-1138

Pet. App. 36a, 40a). After talking to the district judge the following morning, however, "[i]t was no longer a concern for me * * *. I didn't think anymore about it" (*id.* at 34a). Juror Deaton affirmed that the incident did not have "any effect whatsover on [his] verdict" (*ibid.*). Nor, in his opinion, did the incident have any impact on the deliberations of the jury (*id.* at 32a-33a). As Deaton explained, he assumed "after the judge had said that everything was okay that it was something to do with either the SBI or the FBI or some law enforcement agency" (*id.* at 42a). It was to satisfy his curiosity about the incident and the accuracy of his assumption that he asked the judge from the jury box for more details about the photography incident after the jury had rendered its verdict (*id.* at 13a, 34a).

At the conclusion of the hearing, the district court issued written findings and concluded that the deliberations of neither juror Deaton nor other members of the jury had been prejudiced as a result of the incident (C.A. App. 297-299).

3. On appeal, petitioners raised many of the same issues presented here. The court of appeals rejected their challenges and affirmed the convictions. In particular, it held that (1) the federal wiretap evidence was not tainted by allegedly illegal consensual monitoring of phone calls by state police officers (83-1138 Supp. App. 4a-6a); (2) petitioner Jackson, after excluding the time consumed by resolution of his pretrial motions and his request for continuances, was tried within the 120-day limit of the Interstate Agreement on Detainers Act (IAD), 18 U.S.C. App. § 2, Art. IV (83-1138 Supp. App. 8a-9a); (3) there was a preponderance of evidence independent of the co-conspirator statements to show that petitioners Bumgardner and Eleazar were members of the con-

spiracy (*id.* at 11a-12a); (4) the evidence of petitioner Eleazar's participation in the conspiracy was sufficient to support her conviction (*id.* at 16a-17a); and (5) petitioners had received the hearing to which they were entitled regarding the possible prejudicial impact of the photography incident, and the district court's finding that the episode had not prejudiced petitioners was not clearly erroneous (*id.* at 17a-18a).

## ARGUMENT

1. All petitioners except Jackson contend (83-1138 Pet. 8-29; 83-6086 Pet. 5-8; 83-6092 Pet. 16-22) that the photography incident deprived them of their right to an impartial jury. They also argue that the district judge's ex parte contact with juror Deaton deprived them of various constitutional and statutory rights, and that the district court's post-trial hearing inadequately resolved those claims.[5] We submit that, regardless of petitioners' claims of constitutional injury, they have failed altogether to show any harm flowing from the incident. *Rushen* v. *Spain*, No. 82-2083 (Dec. 12, 1983).[6]

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[5] We note that, in the court of appeals, petitioners assessed the merits of this issue to be so low as to accord it less than one page in their brief (C.A. Br. 71-72). That bare statement of the claim was amplified in their reply brief (C.A. Reply Br. 18-28), to which the government, of course, had no opportunity to respond.

[6] The essence of petitioners' various constitutional claims is that they had a due process right to a mid-trial hearing regarding the trial court's contact with juror Deaton. There was, however, a post-trial hearing on the issue that was attended by all petitioners (except Bumgardner, who had been arrested the night before) and their counsel, and all counsel participated in the cross-examination of the witnesses. Even if it would have been preferable for the court to notify counsel

a. Petitioners have failed, as the district court concluded (C.A. App. 299), to carry their initial burden of showing a deprivation of a right so essential to the integrity of the trial that it renders void their presumptively valid convictions. Petitioners were unable to show that juror Deaton's experience interfered, directly or indirectly, with the jury's deliberations.[7] Deaton's overnight suspicion of foul

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promptly of his exchange with Deaton—when, for example, alternate jurors could have been used if he were found to be prejudiced—the omission is not fundamental here, where Deaton was found not to be prejudiced. Indeed, because petitioners do not claim any prejudice from the judge's ex parte contacts themselves, but only from the juror's misapprehension about the photography incident, it is difficult to see why the post-trial hearing was not an adequate forum to inquire into the incident. See *Rushen* v. *Spain*, slip op. 5 n.5 (Stevens, J., concurring).

The complaint of petitioners Peed and Coddington (83-1138 Pet. 23-24) that they were not given prior notice that the September 30 sentencing hearing would also be a hearing into the photography incident is unavailing. They argue that, because of the lack of notice, they were unable to prepare for the hearing by collecting factual information. The simple answer to this contention is that, had the judge convened a mid-trial hearing as petitioners seem to prefer, they would have had no greater opportunity to prepare.

[7] The district court's factual findings regarding its ex parte communications with Deaton and their effect on juror impartiality are entitled to a presumption of correctness. See *Rushen* v. *Spain*, slip op. 6. Cf. *Rogers* v. *United States*, 422 U.S. 35, 40-41 (1975) (Court concludes that ex parte contact by judge with deliberating jurors is not harmless error because of "the nature of the information conveyed to the jury" and the "manner in which it was conveyed"; error was compounded by the fact that the trial court did not hold any hearing into the effect of its communication with the jurors and "petitioner's counsel was not aware of the court's communication until after * * * the petition for certiorari" was granted).

play was based on his erroneous inference from FBI conduct wholly unrelated to him. As Deaton testified, and as the district court found (C.A. App. 298-299), the court's assurance that the photography had nothing to do with him or anyone else on the jury completely alleviated Deaton's concern and the incident had no effect on his deliberations or decision as a juror. Like the juror in *Spain*, Deaton "turned to the most natural source of information—the trial judge" —to report his observations (*Rushen* v. *Spain*, slip op. 7). And, as in *Spain*, the district judge "did not discuss [with the juror] any fact in controversy or any law applicable to the case" (*ibid.*). The conclusion that Deaton was not biased by the photograph incident or his contact with the judge is amply supported by the record.[8]

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[8] Petitioner Eleazar argues (83-6092 Pet. 21) that the trial court's failure to give juror Deaton a complete explanation of the FBI's activities inevitably contributed to bias and that this Court disapproved of such a partial communication in *Remmer* v. *United States*, 350 U.S. 377, 379 (1956). This argument overlooks a critical difference in the facts of the two cases. In *Remmer*, the juror had been approached by a third party who suggested he make a deal with the defendant. Thereafter, the juror approached the trial court, who contacted the FBI, who in turn interviewed the juror (350 U.S. at 380-381). The juror, however, was never informed of the outcome of the FBI investigation (*id.* at 382). This Court remanded the case for a new trial because this course of events left the juror "a disturbed and troubled man * * * subjected to extraneous influences to which no juror should be subjected" (*id.* at 381-382). The facts of this case hardly parallel *Remmer*. Whatever Deaton initially feared, he knew he had no role in and could not be suspected of any wrongdoing. And once he was assured that the incident did not concern him or the other jurors in any way, the possibility of bias was removed.

Nor did petitioners sustain their burden of showing that the other jurors were prejudiced or influenced by the incident. If any of the other jurors saw the original photography, none of them brought it to the attention of the judge. Juror Deaton returned alone to the courthouse to report his concerns. The next morning, before talking to the district judge, Deaton discussed the matter only with the jury foreman (9/30/82 Tr. 105). Not until he returned from the judge's chambers did he tell the other jurors about the incident, and at that point he also conveyed the judge's assurance that it did not concern any of them in any way (83-1138 Pet. App. 32a, 34a, 36a). Thus, none of the other jurors experienced any period of doubt before the matter was resolved.

b. Petitioners contend (83-1138 Pet. 22-29; 83-6086 Pet. 7-8; 83-6092 Pet. 16-22) that the post-trial hearing into the photography incident was defective and did not comport with the requirements of *Remmer* v. *United States*, 347 U.S. 227, 230 (1954). In particular, they argue that the district court erroneously imposed the burden of proof on them rather than on the government and that the district judge's failure to call all the other jurors deprived petitioners of the opportunity to test the impartiality of the whole jury.[9]

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[9] Petitioners also assert (83-1138 Pet. 24-25) that the need for the district judge to relate the circumstances of the ex parte contact required him to recuse himself, because only in that way could he be properly cross-examined. But, while a judge does not properly act as a witness in a trial at which he presides, that principle does not bar him from relating the historical facts surrounding his mid-trial communication with a juror. Because there "is scarcely a lengthy trial in which one or more jurors does not have occasion to speak to the trial judge about something" (*Rushen* v. *Spain*, slip op. 4), forbid-

i. Petitioners' argument that they were required improperly to bear the burden of proof misapprehends *Spain*, *Remmer*, and *Smith* v. *Phillips*, 455 U.S. 209 (1982). A defendant claiming juror impartiality is entitled to a hearing in which he "has the opportunity to prove actual bias." *Phillips*, 455 U.S. at 215; *Rushen* v. *Spain*, slip op. 5 n.3. Some circumstances, however, justify a presumption of bias or prejudice.[10] But the burden shifts to the government to show beyond a reasonable doubt that the error was harmless only after the defendant has established actual or presumptive prejudice. *Remmer*, 347 U.S. at 229.

The facts in this case do not meet the standards for presumptive prejudice as defined by this Court, nor have petitioners shown actual prejudice. This case does not resemble *Remmer*'s attempted bribery of a juror by a third party. Indeed, it involves no third-party contact at all. Just as importantly, the photography incident did not involve a matter pending before the jury. And, no extraneous outside pressures were brought to bear on Deaton or other mem-

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ding a judge to relate these details unless he is called as a witness before another jurist would ignore the "day-to-day realities of courtroom life" (*ibid.*). In any event, every fact related by the judge in this case was corroborated by the FBI agent and juror Deaton, both of whom were extensively cross-examined. Moreover, none of the trial attorneys showed the least reluctance to speak candidly to the judge about his actions (9/30/82 Tr. 174).

[10] In *Remmer*, where a third party had suggested to a juror that he could profit financially by making a deal with the defendant, the court held that "any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is * * * presumptively prejudicial" (347 U.S. at 229).

bers of the jury.[11] Because the facts of this case cannot be considered to raise a presumption of bias on the part of Deaton or other members of the jury, petitioners bore the burden of making an initial showing of actual prejudice; as demonstrated above, they failed to shoulder it.

ii. At the conclusion of the examination of the witnesses at the post-trial hearing, defense counsel requested the district judge to call the other jurors to ascertain the impact of the incident on them (9/30/82 Tr. 169-170). Contrary to petitioners' contention, the district court did not deny their request outright. He instead reserved the decision whether to call additional witnesses until after argument from counsel (*id.* at 171). The thrust of counsel's argument to the district court was that a post-trial hearing skews the resolution of the prejudice issue (*id.* at 174), that the government had engineered the photography incident (*id.* at 176, 179, 182, 184), that the whole affair was highly prejudicial and unfair (*id.* at 175, 177, 179-180, 185-186), and that the government had failed to carry its burden (*id.* at 173, 175). Only the lawyer of the one petitioner who does not present the question to this Court (see 83-1155 Pet. at i) suggested the need to call the other jurors, and even his asserted need for those witnesses was diminished by his claim that, at the outset, prejudice is presumed in a case like this (9/30/82 Tr. 174-175). No other counsel at the hearing

[11] The only "outside influence" on Deaton was created by the juror himself when he misinterpreted the photography incident. The issue at the post-trial hearing was not whether Deaton had been biased by the photography, but whether he harbored any ill will toward petitioners after he received the judge's assurance that the incident had nothing to do with him or the jury.

or following issuance of the court's final order pressed the need to examine the other 13 jurors. The district court's ruling on this issue, therefore, warrants no futher attention by this Court.

In any event, the district court explained its decision not to call additional witnesses. It found Deaton to be a highly credible witness. Referring to Deaton's assertion that the incident was not discussed during the trial or the jury's deliberations, the court found it "inconceivable * * * that any of the other jurors, not directly involved in the incident, could have been prejudiced or influenced in any way" (C.A. App. 299). In these circumstances, the trial court acted well within its discretion in refusing further probing of the jury.

2. Petitioner Jackson contends (83-1155 Pet. 10-23) that the court of appeals erred in concluding that he waived the 120-day limitation of the Interstate Agreement on Detainers Act (IAD), 18 U.S.C. App. § 2, Art. IV(c), when he requested that he be treated in a manner inconsistent with that time limitation by seeking continuances and joining with the other petitioners in several pretrial motions. He cites no authority to the contrary, however, and his position is not supported by reason or the legislative history of the Act.

The government brought petitioner to North Carolina for trial from Florida, where he was in custody, by detainer. He arrived in North Carolina on April 13, 1982, and trial commenced 133 days later, on August 24, 1982. On April 26, 1982, petitioner moved the district court to allow him to adopt the motions of his co-defendants, the hearings on which consumed 16 days (83-1138 Supp. App. 8a). In addition, peti-

tioner requested sir ·ly, or joined in the motions of co-defendants for, continuances which consumed another 50 days (*id.* at 9a). In this Court, as below, petitioner contests the assertion that he sought these continuances (83-1155 Pet. 14). But, as the court of appeals noted, exclusion of the 16-day period required to resolve the pre-trial motions would by itself bring petitioner's trial well within the 120-day limitation period (83-1138 Supp. App. 9a).[12]

Petitioner argues (83-1155 Pet. 19-21) that the court of appeals' analogy to the Speedy Trial Act of 1974, 18 U.S.C. 3161(h), is inconsistent with congressional intent. This claim is, however, refuted by the legislative history of the IAD. The IAD was a legislative response to the Court's ruling in *Dickey* v. *Florida*, 398 U.S. 30 (1970), which held that a state must make a diligent, good faith effort to try a defendant within a reasonable time even when he is serving a sentence in a federal prison outside the state. The

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[12] On facts closely analogous to those of the present case, the Second Circuit recently rejected a claim under the IAD identical to the one presented by petitioner in this Court. *United States* v. *Scheer*, No. 83-1308 (2d Cir. Feb. 24, 1984). In that case, the court of appeals noted that "[t]he defendant asked for additional time to procure an attorney, to suppress evidence and to procure a state transcript. He requested continuances based on the unavailability of his witnesses and moved that the court allow these witnesses to be subpoenaed" (slip op. 2001). Finding that "it is appropriate to exclude all those periods of delay occasioned by the defendant" (slip op. 2000) which in that case amounted to 148 days, the court of appeals concluded that the defendant's rights under the IAD were not violated (*id.* at 2001-2002) (citing cases). Although the defendant had awaited trial a total of 249 days, after deducting the 148 days of delay "that defendant requested * * * solely for his benefit," the court found that he was "brought to trial within the statutory [120-day] time period" (slip op. 2000).

IAD was enacted principally to "afford defendants in criminal cases the right to a speedy trial and diminish the possibility of convictions being vacated or reversed because of a denial of this right." S. Rep. 91-1356, 91st Cong., 2d Sess. 2 (1970). Because the IAD and the Speedy Trial Act of 1974 are both intended to insure speedy trials, they should not be interpreted in a discordant manner. *United States* v. *Odom*, 674 F.2d 228, 231 (4th Cir.), cert. denied, 457 U.S. 1125 (1982). See also *United States* v. *Stewart*, 311 U.S. 60, 64-65 (1940) (statutes having same purpose should be construed together). The court of appeals, therefore, properly concluded that any period lawfully excluded under 18 U.S.C. 3161(h) will generally qualify for exclusion under the "good cause" provision of IAD § 2, Art. IV(c) (83-1138 Supp. App. 8a; *Odom*, 674 F.2d at 231).

Petitioner's further argument that the time provisions of the IAD must be explicitly waived in open court [13] and cannot be waived by his own actions is not supported by the cases on which he relies [14] and

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[13] Petitioner's suggestion (83-1155 Pet. 17) that any waiver here does not comply with the "in open court" provision of the IAD because his motions for continuances and other relief were written is an overly literal interpretation of the Act. The language in the IAD relied upon by petitioner was meant to prohibit ex parte and sua sponte continuances; it was not designed to require the personal presence of the parties to discuss the excludability of time. *Odom*, 674 F.2d at 231.

[14] Petitioner's reliance on *United States* v. *Mauro*, 436 U.S. 340 (1978), is misplaced. In a companion case to *Mauro*, this Court dismissed charges that were not tried within the 120-day limitation of the IAD, but the defendant in that case, unlike petitioner, had made repeated requests for a speedy trial, had taken no action that would delay trial, and had objected to other efforts to continue or delay trial. 436 U.S. at 346-347, 364-365.

is contrary to common sense. Without citing any authority, petitioner claims (83-1155 Pet. 17-19) that his own acts that are inconsistent with the IAD protection of his speedy trial rights cannot be construed as an implicit waiver of the IAD time limitation. But petitioner's argument, taken to its logical conclusion, would give a defendant the power to delay his trial past the 120-day limitation period with pretrial motions and requests for continuances, and then demand dismissal of all charges because of that delay. Such a result is clearly inconsistent with the legislative objective of "diminish[ing] the possibility of convictions being vacated or reversed because of a denial of [a speedy trial]." S. Rep. 91-1356, *supra*, at 2. If petitioner objected to the delay of his trial, he should, like the defendant in *United States* v. *Mauro*, 436 U.S. 340 (1978), have interposed an explicit objection on speedy trial grounds so that the trial court could consider it. *Odom*, 674 F.2d at 231-232.

3. Petitioner Eleazar contends (83-6092 Pet. 14-15) that evidence seized in the federal wiretap should have been excluded because that wiretap was instituted on the basis of information gained from the improper monitoring of telephone calls by state officers. Petitioner's argument founders, however, on both state and federal law.

First, as the court of appeals noted, while a municipal police officer in Florida has limited authority to conduct an investigation outside city limits (*Wilson* v. *Florida*, 403 So.2d 982, 984 (Fla. 1980)), such an investigation is within the officer's authority if the crime under investigation took place within the city limits (83-1138 Supp. App. 5a). In this case, Jacksonville Beach police officers monitored calls made by their informant to Jacques Provost's home

outside city limits. However, because the officers were investigating a double murder that occurred in Jacksonville Beach, which Jacques Provost was suspected of having ordered, the consensual monitoring of the telephone calls was legal under state law (83-1138 Supp. App. 5a).

Second, whether evidence is admissible in a federal court is a question of federal law. See, *e.g.*, *Elkins* v. *United States*, 364 U.S. 206, 223-224 (1960); *United States* v. *Zemek*, 634 F.2d 1159, 1164 n.4 (9th Cir. 1980), cert. denied, 450 U.S. 985 (1981); Fed. R. Evid. 402. Federal law clearly permits the admission of consensual wiretap evidence irrespective of whether it conforms to state wiretap standards. See, *e.g.*, *United States* v. *Adams*, 694 F.2d 200, 201 (9th Cir. 1982), cert. denied, No. 82-1427 (June 13, 1983); *United States* v. *Neville*, 516 F.2d 1302, 1309 (8th Cir. 1975). Because the monitoring of the telephone calls at issue would have been legal under federal law (18 U.S.C. 2511(2)(c)), admission of the wiretap evidence in a federal trial was wholly uncontroversial.

4. Petitioner Eleazar also argues (83-6092 Pet. 15-16) that the evidence supporting her conviction was insufficient.[15] Both courts below have rejected this fact-bound claim and the question does not warrant further consideration by this Court. See *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2

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[15] Petitioner also asserts (83-6092 Pet. 12-13) that there was insufficient evidence independent of her co-conspirators' statements showing the existence of the conspiracy and her participation in it. This fact-bound contention is without merit. There was ample independent evidence showing petitioner Eleazar's participation in the conspiracy—largely derived from recordings of petitioner herself. See n.16, *infra*.

(1975); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).[16]

5. Finally, petitioners Bumgardner and Eleazar complain that the court of appeals' Local Rule 19, which requires the filing of one brief for each side in a consolidated case, violates due process (83-6086 Pet. 4; 83-6092 Pet. 9).[17] We have substantial reservations about the wisdom of this rule, but it does not

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[16] In any event, the record in this case amply supports petitioner Eleazar's conviction. See 83-1138 Supp. App. 16a-17a. For example, in one telephone call petitioner told Bubba Jackson that "Ronnie got all that stuff" (*id.* at 12a, 16a). Later in the same call, Bumgardner informed Jackson that "Teresa [petitioner] went by and picked it up," where "it" referred to cocaine (*ibid.*). During another call, Jackson told Hines to give money from a drug sale to Bumgardner because Bumgardner and petitioner would be wiring money to him. Three days later, Jackson instructed petitioner how to wire money under an assumed name. Although petitioner testified at trial and offered her own version of these events, the jury apparently did not accept her story (*id.* at 17a).

[17] Rule 19 of the Rules of the United States Court of Appeals for the Fourth Circuit provides:

> Related appeals or petitions for review will be consolidated in the Office of the Clerk, with notice to all parties, at the time a briefing schedule is established. One brief shall be permitted per side, including parties permitted to intervene, in all cases consolidated by court order, unless leave to the contrary is granted upon good cause shown. In consolidated cases lead counsel shall be selected by the attorneys on each side and that person's identity made known in writing to the Clerk within seven (7) days of the date of the order of consolidation. In the absence of an agreement by counsel, the Clerk shall designate lead counsel. The individuals so designated shall be responsible for the coordination, preparation and filing of the brief and appendix.

follow that it is unconstitutional or that its application in this case merits review by this Court.

The courts of appeals are authorized to regulate their practice "in any manner not inconsistent with [the Federal Rules of Appellate Procedure]" (Fed. R. App. P. 47), and the court of appeals' rule is not inconsistent with any provision of the rules.[18] The rule is not calculated to preclude the presentation of issues or arguments by individual appellants, but rather to encourage such litigants to keep their appellate pleadings within manageable limits. The record in this case, moreover, demonstrates that the rule did not in fact preclude the petitioners from presenting their various arguments before the court of appeals.

Following entry of the lower court's order consolidating the appeals in this case, all counsel for the various petitioners joined in a motion to enlarge the length of the brief from 50 to 75 pages. That motion was granted by the court. Counsel apparently encountered some difficulty in compiling the consolidated brief, however, and two briefs were in fact submitted to the court of appeals, a 72-page brief and a 128-page brief. The latter, according to counsel, "consist[ed] of the good faith presentation of issues by officers of this court as if they were representing their clients without the inhibitions of * * * Local Rule 19" (Second Motion to Enlarge Length of Brief at 4). The court was not informed at this time that the shorter brief omitted any important arguments

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[18] Rule 28(i) of the Federal Rules of Appellate Procedure provides that, in cases involving multiple appellants or appellees, "any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs."

on behalf of individual petitioners, and the motion to file the 128-page brief was denied.

Thereafter, several reconsideration motions were filed with the court of appeals. These motions, for the first time, suggested that the 72-page brief did not contain certain arguments various petitioners desired to present to the appellate court. See Appellant Gary J. Peed's Motion for Reconsideration at 3-4; Appellant Jeffrey Craig Bumgardner's Motion for Reconsideration at 3-4; Appellant James C. Coddington's Motion for Reconsideration at 3-4. Apart from citing the general "difficulty of filing a joint brief with six parties' interests being represented," [19] however, the motions gave no reasons why the court should further extend its 75-page limitation on the consolidated brief. In particular, although the various motions alleged that counsel for petitioners were "unaware" that certain arguments had been deleted from the shortened brief (Reconsideration Motions for Peed, Bumgardner and Coddington at 4), the papers filed with the court did not explain why counsel were not cognizant of the contents of a brief supposedly prepared under their direction. Moreover, the various motions did not explain why petitioners did not utilize the three remaining pages of briefing left to them under the court's prior order to bring at least some of the "omitted" issues to the court's attention. Accordingly, the court denied the reconsideration motions.

Thus, the course of events in this case does not show that the operation of Local Rule 19 denied petitioners any due process right to present their arguments. Petitioners never availed themselves of their

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[19] Motion for Reconsideration at 3 filed by lead counsel for the appellants.

right under Rule 19 to seek permission to file separate briefs upon a showing of "good cause," nor did they explain in timely fashion what specific prejudice would be incurred by filing within the 75-page limit sought and granted in their initial motion. Rather, petitioners simply refused to present their omitted arguments to the court of appeals on any but their own terms. In these circumstances, their complaint regarding the local rule does not merit review by this Court.

## CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted.

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